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Counsel for Plaintiff Gulf Coast Medical  
Group, LLC, dba SkinMedix

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

GULF COAST MEDICAL GROUP, LLC,  
dba SkinMedix  
8805 Tamiami Trail North # 252  
Naples, Florida 34108  
,

Plaintiff,

vs.

NETSUITE, INC.  
2955 Campus Drive, Suite 100  
San Mateo, California 94403,

Defendant.

Civil Action No.

COMPLAINT

(FRAUDULENT MISPRESENTATION,  
NEGLIGENT MISREPRESENTATION,  
RESTITUTION, VIOLATION OF BUS. &  
PROF. CODE § 17200, BREACH OF  
CONTRACT AND TREBLE DAMAGES  
UNDER PENAL CODE § 496)

DEMAND FOR JURY TRIAL

*Parties*

1. Plaintiff Gulf Coast Medical Group, LLC, dba SkinMedix (“SkinMedix”) is a Florida limited liability company with its principal place of business in Naples, Florida.



1 inventory of 3,000 products. SkinMedix required a platform that could scale with its anticipated  
2 growth to an inventory of 20,000 products – a nearly seven-fold increase.

3 9. At the same time SkinMedix was seeking to upgrade its e-business platform, NetSuite  
4 was aggressively targeting medium-sized businesses such as SkinMedix for its enterprise software  
5 solutions.

6 10. NetSuite represented in its marketing materials that NetSuite’s service was  
7 sophisticated enough to grow or “scale” with companies as they grew, and that it was able to  
8 deliver “sub-second page rendering” whereas “the industry standard is page loads in less than two  
9 seconds.”

10 11. After researching several providers in the marketplace, and after reviewing and  
11 relying on NetSuite’s marketing materials and the representations asserted in them, SkinMedix’s  
12 President, Aaron Kozol, contacted NetSuite to learn more about the solutions it offered, and to  
13 determine if and how NetSuite could help SkinMedix grow and succeed.

14 12. Throughout January 2013 and into February 2013, Mr. Kozol communicated  
15 extensively with NetSuite’s Sales Account Executive, Donald Bizzaro, about SkinMedix’s  
16 requirements for a business software solution, and SkinMedix’s particular needs.

17 13. Because of the high cost of NetSuite’s software solutions, Mr. Kozol specifically  
18 inquired about whether NetSuite could deliver a business solution that met all of SkinMedix’s  
19 needs. If NetSuite could not provide the specific services SkinMedix needed to run and grow its  
20 business, there was no need for SkinMedix to utilize NetSuite, and to incur the high cost of  
21 implementing its services.

22 14. Mr. Bizzaro expressly represented to Mr. Kozol and SkinMedix that NetSuite would  
23 be able to meet all of SkinMedix’s needs that Mr. Kozol described to Mr. Bizarro and NetSuite.

24 15. Mr. Bizzaro is an aggressive salesperson who describes himself as a “product  
25 evangelist.”

26 16. On information and belief, Mr. Bizarro would, and did, receive commissions or other  
27 compensation for his sales of NetSuite’s services to SkinMedix.

1           17. Mr. Bizarro did not tell Mr. Kozal that he, Mr. Bizarro, had only just begun – in  
2 December 2012 – working and selling for NetSuite.

3           18. In his overly zealous efforts to induce SkinMedix to purchase services from NetSuite,  
4 Mr. Bizarro made numerous false representations of fact, as described more fully below.

5           19. In his communications with Mr. Bizzaro, Mr. Kozol described the requirements that  
6 SkinMedix needed in any software solution that it would purchase from NetSuite.

7           20. Specifically, Mr. Kozol advised Mr. Bizzaro that SkinMedix's then-current webstore  
8 suffered from slow and inconsistent page load times.

9           21. Mr. Kozol stressed that SkinMedix required a solution for its customer-facing website  
10 that delivered ultra-high speed page loading and image rendering. Without this functionality, Mr.  
11 Kozol stated, potential customers faced with slow page loading while browsing SkinMedix's  
12 products would not remain on the site, and would look to another retailer.

13           22. In setting out SkinMedix's requirement of high-speed page loading, Mr. Kozol told  
14 Mr. Bizzaro about a 2007 study by Amazon that showed there was a 1% decrease in sales for  
15 every 100 microsecond increase in page loading time. Mr. Bizzaro stated to Mr. Kozol that he was  
16 aware of the 2007 Amazon study, and that he understood the importance and critical nature of  
17 high speed page loading for an internet-based business.

18           23. Mr. Bizzaro told Mr. Kozol that he understood SkinMedix's requirements, and agreed  
19 that it is impossible for an online retailer with a slow website to attract and retain customers. Mr.  
20 Bizzaro represented to Mr. Kozol and SkinMedix that NetSuite was not only capable of providing  
21 "sub-second" page rendering, but also that its Project Team could and would provide that level of  
22 functionality for SkinMedix.

23           24. In particular, Mr. Bizzaro represented that NetSuite had the capability to, and would,  
24 design and host a SkinMedix website where, when a user navigated from page to page, each page  
25 would load and appear in less than a second.

26           25. Because SkinMedix sells its products around the world, Mr. Kozol also stressed that a  
27 critical requirement was that a NetSuite solution had to provide automatic currency conversion for  
28 its web customers, so that, when a customer outside of the United States browsed the SkinMedix

1 website and viewed a product, the price of that product had to be converted to, and displayed in,  
2 (a) the global customer's native currency and (b) the correct price based on the appropriate current  
3 US dollar-native currency exchange rate.

4 26. Mr. Bizzaro represented that NetSuite's solutions were capable of achieving this  
5 functionality, and because of this capability, NetSuite had the ability to, and would, provide  
6 currency conversion in any solution it designed for SkinMedix.

7 27. Mr. Kozol also emphasized to Mr. Bizzaro that SkinMedix's customers were loyal to  
8 certain SkinMedix product brands, so that it was essential that any website created by NetSuite for  
9 SkinMedix feature "brand-prominent" navigation.

10 28. Specifically, Mr. Kozol told Mr. Bizzaro that SkinMedix required a website where a  
11 customer could easily and quickly navigate among all the products of a particular brand and that,  
12 when a customer used this "shop-by-brand" function, the resulting product pages and images  
13 needed to load in the same high speed fashion described above.

14 29. Mr. Bizzaro stated that he understood Mr. Kozol's and SkinMedix's requirements for  
15 brand-prominent navigation.

16 30. Mr. Bizarro represented to Mr. Kozol and SkinMedix that NetSuite had the capability  
17 to design and operate a shop-by-brand navigation function that would have "sub-second" page  
18 loading and image rendering, and that any website NetSuite designed and operated for SkinMedix  
19 would have that critical functionality.

20 31. Mr. Kozol also informed Mr. Bizzaro that SkinMedix was expanding its business to  
21 grow its inventory from 3,000 to 20,000 products, and that SkinMedix therefore required that any  
22 e-commerce software solution it purchased be scalable with SkinMedix's growth. As Mr. Kozol  
23 explained to Mr. Bizarro, as SkinMedix increased the inventory that would be displayed and  
24 accessible on its customer website, and as SkinMedix's sales (and web traffic) grew, its software  
25 solution had to continue delivering high speed page loading and functional currency conversion to  
26 support its expanded business.

27 32. Mr. Bizzaro responded and represented that NetSuite's solutions, with NetSuite's  
28 sophisticated servers and infrastructure could and would scale with SkinMedix as it grew, and

1 were capable of continuously providing the critical functionality (high speed page loading and  
2 currency conversion) that SkinMedix required as SkinMedix increased its inventory and sales.

3 33. Automatic recurring billing and autoship (“ARB”) is an internet function where a  
4 customer can agree to have a seller automatically (a) send the customer a desired product on a  
5 recurring basis and (b) bill and charge the customer for the sale, eliminating the need for the  
6 customer to manually order the product each time the customer wants to purchase it.

7 34. ARB is a key component in internet sales for companies like SkinMedix.

8 35. In their discussions, Mr. Kozol emphasized to Mr. Bizzaro that ARB was an essential  
9 requirement for SkinMedix’s ongoing and future sales growth. Mr. Kozol told Mr. Bizzaro that  
10 Bigcommerce (SkinMedix’s current provider) did not offer ARB on its platform, and SkinMedix  
11 absolutely had to have ARB as part of any service that NetSuite provided.

12 36. Mr. Bizzaro stated that he understood Mr. Kozol’s and SkinMedix’s requirements for  
13 ARB, and represented to Mr. Kozol and SkinMedix that NetSuite not only had ARB capability,  
14 but that NetSuite would include ARB in any service and website design that NetSuite provided for  
15 SkinMedix.

16 37. In their discussions, Mr. Bizzaro expressly represented that, using NetSuite’s ARB  
17 capability, SkinMedix would realize a 30% growth in sales in its first year implementing  
18 NetSuite’s service.

19 38. Mr. Kozol told Mr. Bizzaro that SkinMedix, like many retailers, experienced its  
20 highest traffic and sales volume during the holiday season beginning in December and lasting  
21 through January, so that any NetSuite software solution for SkinMedix had to be fully  
22 implemented and “go live” by no later than August 2013, so that SkinMedix would have sufficient  
23 time to test the platform and work out any bugs or issues so that SkinMedix’s internet website  
24 was fully functional and could meet SkinMedix’s needs before the 2013-2014 holiday season.

25 39. In response, Mr. Bizzaro represented to Mr. Kozol and SkinMedix that NetSuite’s  
26 team would be led by an experienced project manager and could and would design and implement  
27 a complete solution for SkinMedix – with a customer facing website and full back-office  
28 functionality – that would be ready for testing by August 2013.

1           40. Mr. Bizzaro told Mr. Kozol that it would be “pushing it” for NetSuite to have the  
2 promised SkinMedix solution (with back-office and a customer facing website) functional and  
3 ready for testing by July 2013, but NetSuite would certainly have the solution ready by August  
4 2013.

5           41. At all relevant times, Mr. Bizzaro was acting as an agent, representative and employee  
6 of NetSuite.

7           42. In reliance on Mr. Bizzaro’s specific representations – including NetSuite’s ability to  
8 provide SkinMedix with (a) high speed page loading; (b) currency conversion; (c) brand-  
9 prominent, “shop by brand” navigation; (d); scalability; (e) automatic recurring billing (“ARB”)  
10 functionality resulting in a 30% growth in sales; and (f) implementation and testing by August of  
11 2013, described above – SkinMedix was induced to and did enter into an agreement with NetSuite  
12 in February 2013 to purchase its software solutions and service.

13           43. SkinMedix agreed to purchase a three-year license for NetSuite’s “back-office”  
14 software solution, and agreed to pay NetSuite to design and build SkinMedix’s customer facing  
15 website.

16           44. Immediately before executing the contract with NetSuite, Mr. Kozol contacted Mr.  
17 Bizzaro to express his concern that there did not appear to be any reference to the ARB  
18 functionality in NetSuite’s proposed contract documents.

19           45. In response Mr. Bizzaro assured Mr. Kozol and SkinMedix that ARB functionality  
20 was included in the contract documents because it was “never out of scope” for SkinMedix, was  
21 “fully developed in NetSuite, ” “was a given and considered included” in the contract, and “is and  
22 will be a seamless component of your NetSuite experience.”

23           46. On or about February 27, 2013, in reliance on the express promises and  
24 representations described above, SkinMedix entered into a contract with NetSuite.

25           47. In entering into the contract with NetSuite, Mr. Kozol and SkinMedix relied on Mr.  
26 Bizzaro’s express representations about the existence of the ARB functionality in the contract.

27           48. Pursuant to the contract, SkinMedix paid NetSuite and affiliated partners  
28 approximately \$250,000.00 between March and July 2013 for the services described above.



1           49. Not long after SkinMedix contracted with NetSuite to provide it with its e-commerce  
2 software services platform, a NetSuite marketing representative contacted Mr. Kozol to interview  
3 him about his experience with NetSuite.

4           50. Although the NetSuite solution had yet to be implemented for SkinMedix at the time  
5 of the interview, Mr. Kozol expressed his enthusiasm about the NetSuite capabilities that Mr.  
6 Bizzaro had represented to Mr. Kozol and to SkinMedix and how “nothing had given [SkinMedix]  
7 all the answers to run the business from top to bottom until NetSuite,”

8           51. After entering into its contract with NetSuite, it became apparent that NetSuite was  
9 incapable of delivering and providing the services that Mr. Bizzaro represented that NetSuite was  
10 able to provide to SkinMedix.

11           52. The website NetSuite designed for Skin Medix was not capable of delivering sub-  
12 second page loading times.

13           53. Testing by SkinMedix has demonstrated paged loading times of greater than four  
14 seconds domestically and seven seconds internationally.

15           54. Despite repeated complaints from SkinMedix, the website NetSuite designed for it  
16 has never achieved sub-second page loading and has never achieved the industry standard of “less  
17 than 2 seconds.”

18           55. NetSuite was incapable of designing and implementing a functioning currency  
19 converter.

20           56. The website NetSuite designed informs SkinMedix’s global customers in a page  
21 footer that a product price is shown in the consumer’s native currency, and that the customer will  
22 be charged in U.S. dollar equivalents.

23           57. The website also provides a drop-down menu for a customer to choose the currency in  
24 which product prices are displayed.

25           58. In actuality, the website displays product prices in U.S. dollars only, regardless of  
26 which currency a customer selects and regardless of what the page footer states.

27           59. This presents a tremendous potential liability for SkinMedix, as its website, as  
28 developed by NetSuite, effectively misrepresents product prices to global customers.



1           60. Contrary to Mr. Bizzaro's representations, NetSuite did not have the capability of  
2 providing high-speed brand-prominent "shop by brand" navigation.

3           61. When a customer chooses to shop for products by brand, the product pages and  
4 images fail to load at sub-second speeds, and in many instances require up to seven seconds to  
5 load.

6           62. This is because any time a customer selects "shop by brand," NetSuite's design  
7 architecture causes a search of SkinMedix's entire inventory of products, and then sorts the entire  
8 inventory for the selected brand before populating a results page.

9           63. NetSuite therefore did not have the efficient, high-speed page loading brand-  
10 prominent navigation feature Mr. Bizzaro represented it had, so that hat feature was not in the  
11 website NetSuite designed for SkinMedix.

12           64. NetSuite's website coding and architecture searches every item in SkinMedix's  
13 inventory before arriving at a landing page.

14           65. This makes it incapable of scaling with SkinMedix's anticipated growth.

15           66. NetSuite and its Project Team do not have the capability of providing sub-second  
16 page loading times for SkinMedix's current inventory of 3,000 products.

17           67. Adding additional inventory and products correspondingly increases page load times.

18           68. The NetSuite design therefore is incapable of maintaining sub-second page loading in  
19 the face of SkinMedix's anticipated 20,000 item product inventory.

20           69. NetSuite therefore does not and did not have the capability of designing a customer  
21 facing website for SkinMedix that could scale with its growth, as Mr. Bizzaro represented.

22           70. The website NetSuite designed for SkinMedix and the services that NetSuite provided  
23 to SkinMedix did not include an automatic recurring billing ("ARB") function.

24           71. NetSuite failed to design and implement the promised SkinMedix customer facing  
25 website by August 2013.

26           72. NetSuite's design team, including its project manager, was incapable of designing and  
27 implementing the solution SkinMedix required by August 2013.

1           73. Mr. Bizzaro and NetSuite (a) knew that the representations he and NetSuite made to  
2 Mr. Kozol and SkinMedix described above were false, (b) made those misrepresentations without  
3 knowledge of or regard for whether they were true or false, and (c) should have known that his  
4 representations were false.

5           74. Mr. Bizzaro made those representations with the intent that Mr. Kozol and SkinMedix  
6 would rely on them so that SkinMedix would purchase NetSuite's services.

7           75. As a result of Mr. Bizzaro's representations, and in reasonable reliance on them,  
8 SkinMedix (a) was induced to enter into a contract with NetSuite and (b) has paid over a quarter of  
9 a million dollars to NetSuite and its affiliates in exchange for a service that is useless to  
10 SkinMedix.

11           76. The customer facing website that NetSuite designed for SkinMedix performs (a)  
12 worse than the Bigcommerce-based website SkinMedix sought to replace; (b) was never used by  
13 SkinMedix; and (c) is manifestly unuseable for the reasons described herein.

14           77. SkinMedix cannot use the website NetSuite created because of the unacceptably slow  
15 page rendering (which would drive customers away); its inability to provide correct currency  
16 conversions (which would potentially give rise to misrepresentation claims when global customers  
17 order an item at a price they thought was in their native currency, but are then charged a different  
18 amount); its inability to provide brand-prominent navigation; its inability to scale with  
19 SkinMedix's anticipated growth; and its lack of an ARB function.

20           78. Because of the numerous failures described herein, the website NetSuite designed for  
21 SkinMedix never went "live." That is, the website was never publicly available for use by  
22 potential SkinMedix customers.

23           79. SkinMedix's anticipated growth is being hampered by NetSuite's website's failings.

24           80. Mr. Kozol and SkinMedix have notified NetSuite and its design engineers and project  
25 managers of NetSuite's numerous failures described above.

26           81. NetSuite has failed, refused, or been unable to correct the failures.

27           82. NetSuite has failed to provide SkinMedix with a website and services that contain the  
28 required functionality that Mr. Kozol and SkinMedix told Mr. Bizzaro SkinMedix had to have,

1 and that Mr. Bizzaro represented that NetSuite had the capability of delivering and would deliver  
2 to SkinMedix.

3 83. It has been more than a year since SkinMedix paid NetSuite to build its customer  
4 facing website and paid for the use its “back office” administrative solutions.

5 84. During this time, NetSuite has proved itself incapable of constructing a website that  
6 contained the specific functions that Mr. Bizzaro represented that NetSuite had the ability to  
7 design and implement, thus frustrating SkinMedix’s entire purpose for engaging NetSuite’s  
8 services as opposed to those of other providers.

9 85. SkinMedix has paid NetSuite a year’s worth of licensing fees for a “back-office”  
10 solution that has been unnecessary and gone unused because NetSuite’s customer facing website  
11 cannot, for the reasons stated above, be deployed to generate the sales that would be administered  
12 through the “back office” solution.

13 86. At the time when Mr. Kozol was in the futile process of identifying NetSuite’s  
14 failures and requesting that these failures be corrected, NetSuite published a “Customer Spotlight”  
15 article on its official NetSuite blog featuring SkinMedix.

16 87. The article purported to state how SkinMedix had found success by using NetSuite to  
17 support all of its business processes.

18 88. The article stated that NetSuite supported “SkinMedix’s growing international  
19 business and transactions in multiple currencies, including those of Hong Kong, Japan, Australia,  
20 New Zealand, the U.K., Sweden, Canada, as well as the Euro.”

21 89. In fact, as described above, the website NetSuite designed for SkinMedix did not  
22 support SkinMedix’s international business because it did not contain a functional currency  
23 converter.

24 90. NetSuite’s blog article also represented that SkinMedix now had a recurring orders  
25 capability with NetSuite. As stated above, the ARB capability has never been functional and was  
26 never provided by NetSuite.

27 91. NetSuite’s blog article also represented that “the new SkinMedix website automates  
28 display of out-of-stock notifications.”



1 102. Mr. Bizzaro made these representations with the specific intent that Mr. Kozol and  
2 SkinMedix would rely on them to cause and induce SkinMedix to purchase services from  
3 NetSuite.

4 103. Mr. Kozol and SkinMedix relied on Mr. Bizzaro's representations

5 104. Their reliance was reasonable in light of Mr. Bizzaro's professed knowledge of  
6 NetSuite's capabilities.

7 105. As a result of Mr. Bizzaro's and NetSuite's false representations, and Mr. Kozol's and  
8 SkinMedix's reliance on them, SkinMedix entered into a contract with NetSuite where SkinMedix  
9 purchased a three year license for certain software solutions and paid for certain website design  
10 and support services from NetSuite.

11 106. Because Mr. Bizzaro's representations were false, the services that SkinMedix  
12 purchased from NetSuite were and are neither functional nor useable by SkinMedix.

13 107. SkinMedix paid NetSuite and its partners in excess of \$250,000.00.

14 108. SkinMedix did not receive any value or benefit for those payments.

15 109. As a further result of Mr. Bizzaro's and NetSuite's misrepresentations, SkinMedix has  
16 sustained a loss of profits and loss of business growth from December 1, 2013 to the present and  
17 continuing.

18 110. SkinMedix was forced to divert hundreds of hours of employee time, and additional  
19 expenses, in a futile attempt to cause NetSuite to deliver a website that NetSuite was not capable  
20 of producing.

21 ***Count II***

22 ***Negligent Misrepresentation***

23 111. SkinMedix incorporates the allegations in the preceding paragraphs as if fully set  
24 forth herein.

25 112. NetSuite, through its authorized agent Mr. Bizzaro, represented to Mr. Kozol of  
26 SkinMedix, that NetSuite possessed the capability to design, implement and deliver an e-  
27 commerce software solution with the specific capability and functionality described above and to  
28 do so by August of 2013.

1 113. At the time Mr. Bizzaro made the representations to Mr. Kozol and SkinMedix, Mr.  
2 Bizzaro knew, or in the exercise of reasonable care, should have known, that NetSuite did not  
3 possess those capabilities, making Mr. Bizzaro's representations false.

4 114. Mr. Bizarro intended that Mr. Kozol and SkinMedix would rely on those  
5 representations and induced them to rely on them.

6 115. Mr. Kozol and SkinMedix relied on Mr. Bizzaro's representations.

7 116. Their reliance was reasonable in light of Mr. Bizzaro's professed knowledge of  
8 NetSuite's capabilities.

9 117. As a result of Mr. Bizzaro's and NetSuite's false representations, and Mr. Kozol's and  
10 SkinMedix's reasonable reliance on them, SkinMedix entered into a contract with NetSuite where  
11 SkinMedix purchased a three year license for certain software solutions and paid for certain  
12 website design and support services from NetSuite.

13 118. Because Mr. Bizzaro's representations were false, the services that SkinMedix  
14 purchased from NetSuite were and are neither functional nor useable by SkinMedix.

15 119. SkinMedix paid NetSuite and its affiliates in excess of \$250,000.00 and did not  
16 receive any value or benefit for those payments.

17 120. As a further result of Mr. Bizzaro's negligent misrepresentations, SkinMedix has  
18 sustained a loss of profits and loss of business growth from December 1, 2013 to the present and  
19 continuing.

20 121. SkinMedix was forced to divert hundreds of hours of employee time, and additional  
21 expenses, in a futile attempt to cause NetSuite to deliver a website that NetSuite was not capable  
22 of producing.

23 122. These damages did not result in any way from any negligence on the part of  
24 SkinMedix.

25 ***Count III***

26 ***Restitution***

27 123. SkinMedix incorporates the allegations in the preceding paragraphs as if fully set  
28 forth herein.

1 124. As a result of the fraudulent or negligent representations described above, SkinMedix  
 2 entered into a contract with NetSuite where SkinMedix paid NetSuite and affiliates in excess of  
 3 \$250,000.00.

4 125. Had NetSuite not made the statements described above, but instead disclosed  
 5 NetSuite's actual capabilities or the lack of those capabilities, SkinMedix would not have entered  
 6 into its agreement with NetSuite or paid NetSuite the sums described.

7 126. Independent of any misrepresentations, SkinMedix has paid substantial sums to  
 8 NetSuite and has in turn received a purported e-commerce solution that is not capable of being  
 9 used by SkinMedix, and which, if deployed by SkinMedix, would cause SkinMedix to lose  
 10 business and would expose it to potential liability that includes, but is not limited to, liability for  
 11 price misrepresentation to its global customers.

12 127. NetSuite has been unjustly enriched, and it would be inequitable for NetSuite to retain  
 13 any of the monies that SkinMedix has paid to it.

14 ***Count IV***

15 ***Violation of Business and Professions Code § 17200 et seq.***

16 128. SkinMedix incorporates the allegations in the preceding paragraphs as if fully set  
 17 forth herein.

18 129. NetSuite's conduct constitutes unfair or fraudulent business acts or practices within  
 19 the meaning of Business and Professions Code § 17200.

20 130. SkinMedix is entitled to "such order[] or judgment[] ... as may be necessary to  
 21 prevent the use or employment by [NetSuite of those] practice[s] which constitute[] unfair  
 22 competition" and "as may be necessary to restore to [SkinMedix] its "money or property" that  
 23 NetSuite "acquired by means of such unfair competition." Business and Professions Code §  
 24 17203.

25 ***Count V***

26 ***Breach of Contract***

27 131. SkinMedix incorporates the allegations in the preceding paragraphs as if fully set  
 28 forth herein.



1           132. SkinMedix entered into a contract with NetSuite in which SkinMedix agreed to pay  
2 NetSuite certain sums in consideration for NetSuite to provide and implement an e-commerce  
3 solution for SkinMedix's business.

4           133. In consideration for the sums paid and to be paid by SkinMedix, NetSuite agreed to  
5 provide a solution that possessed the capabilities described above.

6           134. NetSuite failed to provide these capabilities, which constitutes a material breach of its  
7 contract with SkinMedix.

8           135. In addition to the currency conversion functionality, high speed page loading  
9 capability, and website scalability previously described, NetSuite agreed to provide other  
10 functions that are critical to a viable e-commerce business.

11           136. Specifically, NetSuite agreed to provide website navigational functions that included,  
12 but are not limited to: (a) "previous and next"; (b) "shop by brand"; (c) "shop by category"; and  
13 (d) "breadcrumbs."

14           137. None of these promised functions has worked properly in the website NetSuite  
15 designed.

16           138. Without an easily and properly navigable website with these features, customers will  
17 neither remain browsing SkinMedix's website to purchase its products nor return to it.

18           139. These failings each constitute a material breach of SkinMedix's contract with  
19 NetSuite.

20           140. NetSuite agreed to equip the SkinMedix website with a "back in stock notification"  
21 function and a product review function.

22           141. The former allows a customer to request e-mail notification when a desired, but out-  
23 of-stock product is available for purchase, thus increasing SkinMedix's sales; the latter permits  
24 customers to review products, which SkinMedix could then moderate and choose which reviews  
25 to publish on its website.

26           142. Neither of these functions operates properly.

27           143. Customers do not receive notification of the availability of desired items – which will  
28 result in a sales decline – and SkinMedix is not able to publish favorable customer reviews. These

1 breaches are material because they amount to noticeable deficiencies in a customer's web  
2 browsing experience, which will drive web traffic away from SkinMedix and to a competitor.

3 144. NetSuite agreed to provide SkinMedix with an ARB function as described above.

4 145. NetSuite has failed and refused to provide this functionality.

5 146. This failure constitutes a material breach of NetSuite's contract with SkinMedix.

6 147. As a direct and proximate result of NetSuite's breaches of contract, as described  
7 above, SkinMedix has paid in excess of \$250,000.00 for a purported e-commerce solution that is  
8 not capable of being used by SkinMedix, and which, if deployed by SkinMedix, would cause  
9 SkinMedix to lose business and expose it to potential liability that includes, but is not limited to,  
10 liability for price misrepresentation to its global customers.

11 148. SkinMedix was forced to divert hundreds of hours of employee time, and additional  
12 expenses, in a futile attempt to cause NetSuite to deliver a website that NetSuite was not capable  
13 of producing.

#### 14 *Count VI*

#### 15 *Violation of Penal Code § 496*

16 149. SkinMedix incorporates the allegations in the preceding paragraphs as if fully set  
17 forth herein.

18 150. Penal Code § 496(a) makes receiving or buying property "that has been obtained in  
19 any manner constituting theft" a criminal offense punishable by imprisonment. Penal Code §  
20 496(c) provides that any person "who has been injured by a violation of [§ 496(a)] ... may bring an  
21 action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit,  
22 and reasonable attorney's fees."

23 151. Section 496(a) extends to property "that has been obtained in any manner constituting  
24 theft."

25 152. Penal Code § 484 describes acts constituting theft. The first sentence of § 484(a)  
26 states in relevant part: "Every person . . . who shall knowingly and designedly, by any false or  
27 fraudulent representation or pretense, defraud any other person of money, . . . and thereby  
28 fraudulently gets or obtains possession of money, . . . is guilty of theft."

1 153. Section 484 thus defines theft to include theft by false pretense. Penal Code § 532  
2 also defines criminal fraud in terms nearly identical to § 484(a) and provides that these acts are  
3 punishable “‘in the same manner and to the same extent’ as larceny.”

4 154. As a result of the false and fraudulent representations by Mr. Bizarro and NetSuite set  
5 out above, NetSuite knowingly and designedly, by false or fraudulent representation or pretense,  
6 defrauded SkinMedix of the money and funds it paid to NetSuite and thereby fraudulently got or  
7 obtained possession of money from SkinMedix.

8 155. SkinMedix has been injured by a violation of Penal Code § 496(a) and is therefore  
9 entitled pursuant to Penal Code § 496(c) to three times the amount of its actual damages, together  
10 with its costs of suit and reasonable attorney’s fees.

11 ***Prayer for Relief***

12 Wherefore, plaintiff Gulf Coast Medical Group, LLC, d/b/a SkinMedix, prays that this  
13 Court:

- 14 A. Rescind the contract between it and NetSuite;  
15 B. Require NetSuite to restore to SkinMedix as restitution the sums it has paid to  
16 NetSuite;  
17 C. Award SkinMedix compensatory damages in excess of \$75,000.00;  
18 D. Award SkinMedix damages for its lost profits;  
19 E. Award SkinMedix punitive damages;  
20 F. Award SkinMedix three times its actual damages;  
21 G. Award SkinMedix its costs and attorney’s fees; and  
22 H. Grant SkinMedix such other relief as may be just and proper.  
23

24 Dated: May 13, 2014

KIEVE LAW OFFICES

25 By 

26 Loren Kieve (Bar No. 56280)

27 SHAPIRO SHER GUINOT & SANDLER  
28

1  
2 By /s/ Paul Mark Sandler

3 Paul Mark Sandler (*Pro Hac Vice pending*)  
4 Eric R. Harlan, Esquire (*Pro Hac Vice pending*)

5 Counsel for plaintiff Gulf Coast Medical Group,  
6 LLC, d/b/a SkinMedix

7 ***Jury Demand***

8 Plaintiff demands a jury trial as to all issues triable to a jury.

9 

10 Loren Kieve  
11 Counsel for plaintiff Gulf Coast Medical Group,  
12 LLC, d/b/a SkinMedix  
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